

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUCCESSFACTORS, INC., a Delaware
corporation,

Plaintiff,

v.

SOFTSCAPE, INC., a Delaware
corporation; and DOES 1-10,

Defendants.

No. C 08-1376 CW

ORDER GRANTING IN
PART PLAINTIFF'S
MOTION FOR
PRELIMINARY
INJUNCTION AND
PLAINTIFF'S MOTION
FOR EXPEDITED
DISCOVERY

Plaintiff SuccessFactors, Inc. moves for a preliminary injunction enjoining Defendant from (1) disseminating, publishing, causing to be made available to the public, affirming the purported truth or accuracy of, or directing any person to disseminate, publish, cause to be made available to the public or affirm the purported truth or accuracy of a certain presentation; (2) disseminating, publishing, causing to be made available to the public, affirming, or directing any person to disseminate, publish, cause to be made available to the public or affirm the allegedly false or misleading statements set forth within that presentation; (3) representing or implying that a person or entity other than Defendant authored any statement in the presentation regarding

1 Plaintiff when such person or entity did not explicitly so author;
2 (4) disseminating or making public use of Plaintiff's trade name,
3 trademark or logo beyond that amount reasonably necessary to
4 identify Plaintiff or its products and services; (5) accessing or
5 obtaining data from any computer system or computer owned, operated
6 or licensed by Plaintiff and subject to restrictions on access
7 without Plaintiff's express written authorization; or
8 (6) disclosing, publishing, reproducing or communicating any
9 information or data received from such a restricted computer or
10 computer system. Plaintiff also seeks an order allowing certain
11 expedited discovery.

12 The Court issued a temporary restraining order on March 13,
13 2008 and set a briefing schedule. Defendant has opposed both
14 motions. The motions were heard on March 27, 2008. Having
15 considered all of the papers filed by the parties and oral argument
16 on the motion, the Court grants in part Plaintiff's motion for a
17 preliminary injunction and denies it in part and grants in part
18 Plaintiff's motion for expedited discovery.

19 BACKGROUND

20 Plaintiff is a publicly traded company that provides internet-
21 based human resources management software. Defendant is one of
22 Plaintiff's competitors. On or about March 24, 2008, hundreds of
23 Plaintiff's actual or prospective customers received an email from
24 "John Anonymous" with the email address hcmknowledg2008a@gmail.com.
25 The subject line of the message is "SuccessFactors Failures and
26 Problems" and the body reads, "If you are thinking about purchasing
27 from SuccessFactors, please read the following document; it
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1 provides information about Successfactors [sic] which they do not
2 want you to know." Bernshteyn Decl., Ex. 1. Attached to the
3 message was a forty-three page PowerPoint presentation titled "The
4 Naked Truth." The presentation appears on a SuccessFactors
5 template and includes SuccessFactor's trademarked logo at the top
6 of each page. The presentation purports to be "a compilation of
7 the facts from Successfactors [sic] customers" and states that the
8 facts contained in the presentation "represent the measure of
9 Successfactors' [sic] lack of corporate integrity and why many of
10 us have left them." Id. In addition, Plaintiff alleges that the
11 presentation includes screenshots from three areas of its website:
12 (1) a publicly-available list of customers taken both before and
13 after February 28, 2008, when the list was updated, (2) screens
14 from several publicly available "webinars" and (3) screens from
15 Plaintiff's ACE environment, a password-protected area which is
16 accessible only to Plaintiff's employees, authorized customers,
17 authorized prospective customers and partners.

18 After learning about the presentation and its contents,
19 Plaintiff analyzed its computer logs to determine which IP
20 addresses had accessed each of these three areas of its website
21 between February 11, 2008 and March 4, 2008. Plaintiff states that
22 only one IP address that is not associated with one of its own
23 offices or employees accessed all three areas of the website. That
24 IP address, 68.236.68.19 belongs to Defendant's Wayland,
25 Massachusetts office. Plaintiff also determined that this IP
26 address had accessed a specific ACE account, the ACE275 demo
27 account, on February 19 and 21, 2008. One of the screenshots in
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1 the presentation is taken from a customized goal included in the
2 ACE275 demonstration.

3 Plaintiff also discovered that the ACE275 account was accessed
4 without authorization from three additional IP addresses, two
5 residential IP addresses located near Wayland, Massachusetts and
6 one business address assigned to Defendant's London, England
7 office. The ACE275 account was created for a purported prospective
8 customer named Ely Valles on behalf of a company called New
9 Millenium [sic] Shoe. At the hearing, Defendant disclosed that its
10 CEO David Watkins is also the CEO of New Millenium [sic] Shoe.

11 Plaintiff also searched its Customer Relationship Management
12 (CRM) database for any information associated with the IP addresses
13 it identified. The CRM database is a repository of registration
14 information from individuals who seek access to the publicly-
15 available webinars, white papers and data sheets on Plaintiff's
16 website. Plaintiff discovered nine entries in the CRM database,
17 dating back to January, 2006, for the 68.236.68.19 IP address. The
18 name and registration information provided by the person accessing
19 Plaintiff's website from that IP address varied and Plaintiff
20 suspects that many of the names were false. However, Plaintiff
21 found information linking to Defendant two of the names provided.

22 Plaintiff alleges in the three days after the anonymous email
23 was sent, it received numerous inquiries from concerned current and
24 prospective customers. On March 7, 2008, JMP Securities, an
25 investment bank that provides market analysis of securities,
26 described the presentation as "highly critical of SuccessFactors."
27 Bernshteyn Decl., Ex. 3. The JMP report contained this heading:

1 "We maintain our Market Outperform rating on SuccessFactors, but
2 reduce our price target from \$15 to \$12 in light of the compression
3 in the on demand comparables." Id. Under this heading, and
4 referring to the presentation, the JMP report stated, "While some
5 of the critical claims certainly seem to be exaggerated or
6 unfounded, the descriptions of specific customer problems are
7 harder to dismiss without independent analysis." Id. Therefore,
8 the report stated, "[W]e reserve final judgment until we have had a
9 chance to conduct some independent due diligence." Id. On March
10 10, JMP issued another report subtitled "Johnny Anonymous Loses
11 Round One" and describing the "case studies regarding alleged
12 problems with customer implementations" as "unfounded." Id. at Ex.
13 4. Plaintiff also provides evidence that concerns about the
14 presentation have been discussed on an internet message board
15 related to SuccessFactors' stock. Id. at Ex. 5.

16 On March 11, 2008, Plaintiff filed a complaint, alleging
17 claims of false and misleading statements under the Lanham Act and
18 California Business and Professions Code § 17500; trademark
19 infringement under the Lanham Act; damages under the Computer Fraud
20 and Abuse Act (CFAA), 18 U.S.C. § 1030; unauthorized access to
21 computers, computer system and computer data under California Penal
22 Code § 502; defamation; trade libel; intentional interference with
23 prospective economic relations; and unfair competition. On that
24 date, Plaintiff also filed a motion for a temporary restraining
25 order and application for expedited discovery, with notice to
26 Defendant. Defendant opposed the motions, and, on March 13, 2008,
27 the Court granted in part Plaintiff's motion for a temporary
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1 restraining order and granted in part Plaintiff's motion for
2 expedited discovery.

3 Defendant concedes that it created the presentation but argues
4 that it was intended only for internal use by Defendant's sales
5 force. Defendant states that it does not and will not use the
6 presentation in any external sales or marketing efforts. It
7 considers the presentation to be "its confidential strategic
8 business information" and states that it does not know who
9 distributed it outside the company. Response to Order to Show
10 Cause (Response) at 2. Defendant asserts that, since the
11 presentation's creation, it has instructed its employees that the
12 document is strictly for internal use.

13 However, the only evidence Defendant presents in support of
14 this assertion is two email messages from its CEO to its employees,
15 each sent after the complaint was filed. Both of the email
16 messages state that the presentation is only for internal use while
17 maintaining that the presentation is based on "publicly available
18 sources." Watkins Decl., Exs. A & B. One of the messages
19 instructs that "[i]nformation contained in the document should be
20 used judiciously in competitive situation [sic] as required."
21 Watkins Decl., Ex. A. In addition to its internal reassurance that
22 the information contained in the presentation was substantiated,
23 Defendant issued a press release publicly affirming the veracity of
24 the presentation. The press release states that the presentation
25 "was based on substantiated facts." Id. at Ex. 3. Plaintiff
26 provides evidence that Defendant has emailed a link to this press
27 release to its potential customers who are also Plaintiff's
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1 potential customers. Bernshteyn Reply Decl., Ex. 4.

2 LEGAL STANDARD

3 To obtain a preliminary injunction, the moving party must
4 establish either: (1) a combination of probable success on the
5 merits and the possibility of irreparable harm, or (2) that serious
6 questions regarding the merits exist and the balance of hardships
7 tips sharply in the moving party's favor. Rodeo Collection, Ltd.
8 v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987).

9 The test is a "continuum in which the required showing of harm
10 varies inversely with the required showing of meritoriousness."
11 Id. (quoting San Diego Comm. Against Registration & the Draft v.
12 Governing Bd. of Grossmont Union High Sch. Dist., 790 F.2d 1471,
13 1473 n.3 (9th Cir. 1986)). The moving party ordinarily must show
14 "a significant threat of irreparable injury," although there is "a
15 sliding scale in which the required degree of irreparable harm
16 increases as the probability of success decreases," United States
17 v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174, 175 (9th Cir.
18 1987), and vice versa. To overcome a weak showing of merit, a
19 plaintiff seeking a preliminary injunction must make a very strong
20 showing that the balance of hardships is in its favor. Rodeo
21 Collection, 812 F.2d at 1217.

22 DISCUSSION

23 I. Probability of Success on the Merits

24 Plaintiff argues that there is a sufficient likelihood that it
25 will succeed on the merits of three of its claims to support the
26 grant of a preliminary injunction.

1 A. CFAA

2 Plaintiff first argues that it is likely to succeed on the
3 merits of its claim under the CFAA, which creates liability for
4 anybody who "intentionally accesses a computer without
5 authorization or exceeds authorized access, and thereby obtains
6 . . . information from any protected computer if the conduct
7 involved an interstate or foreign communication." 18 U.S.C.
8 § 1030(a)(2)(C). The CFAA further provides, "Any person who
9 suffers damage or loss by reason of a violation of this section may
10 maintain a civil action against the violator to obtain compensatory
11 damages and injunctive relief or other equitable relief." Id.
12 § 1030(g). For purposes of a civil action, the loss, including
13 "any reasonable cost to any victim, including the cost of
14 responding to an offense, conducting a damage assessment, and
15 restoring the data, program, system, or information to its
16 condition prior to the offense, and any revenue lost, cost
17 incurred, or other consequential damages incurred because of
18 interruption of service," must total at least \$5,000 in value.¹
19 Id. §§ 1030(a)(5)(B)(I); 1030(e)(11); 1030(g).

20 Plaintiff contends that it can prove that it suffered over
21 \$5,000 in losses, citing the

22 analysis of which restricted environments had been
23 accessed (to determine the extent of breach);
24 collection and analysis of IP addresses accessing
25 Plaintiff's network, to determine whether access was
internal or hostile (to determine the appropriate
response); and review of logs of documented users to

26 ¹A civil action may also be maintained based on other types of
27 damages not relevant to this case. See 18 U.S.C.
28 § 1020(a)(5)(B)(ii)-(v).

1 confirm conclusions.

2 Reply at 13. Plaintiff claims, "These reasonable responses took
3 many hours of valuable time away from day-to-day responsibilities,
4 causing losses well in excess of \$5,000." Id.

5 Defendant argues only that Plaintiff's CFAA claim will fail
6 because Plaintiff's alleged cost of discovering the author of the
7 presentation does not fit the definition of "loss" under the
8 statute. Defendant cites Tyco International (U.S.) v. Does, 2003
9 U.S. Dist. LEXIS 25136 (S.D.N.Y.), in support of its argument that
10 the "cost of investigating and trying to locate the perpetrator is
11 not included as a qualifying type of loss." Id. at *8-9.

12 However, Tyco and the other cases upon which Defendant relies
13 are neither controlling nor directly on point. In Tyco, the New
14 York court addressed a CFAA claim against an individual who
15 unsuccessfully attempted to damage Tyco's computers by sending
16 spam. In that case, default entered against the defendant and Tyco
17 argued that it was entitled to recover as damages the fees paid to
18 its investigator to discover the identity of the unsuccessful
19 spammer. The court acknowledged that "the CFAA allows recovery for
20 losses beyond mere physical damage to property" but found that "the
21 additional types of damages awarded by courts under the Act have
22 generally been limited to those costs necessary to assess the
23 damages caused to plaintiff's system or to resecure the system in
24 the wake of a spamming attack." Id. at *10.

25 However, in cases like this, where the offense involves
26 unauthorized access and the use of protected information, the
27 reasonable "cost of responding to [the] offense," 18 U.S.C.

§ 1030(a)(5)(B)(I), will be different from such cost in a case where the primary concern is the damage to the plaintiff's computer system itself. While discovering who caused the damage would be important to the plaintiff in a case such as Tyco to determine from whom it should seek relief, it is not essential to remedying or discovering the extent of the harm. In contrast, where the offender has actually accessed protected information, discovering who has that information and what information he or she has is essential to remedying the harm. In such cases courts have considered the cost of discovering the identity of the offender or the method by which the offender accessed the protected information to be part of the loss for purposes of the CFAA. See, e.g., Shamrock Foods Co. v. Gast, 2008 U.S. Dist. LEXIS 15329, *2-3 (D. Ariz.) (finding that the cost the plaintiff incurred in conducting a forensic analysis of the defendant's computer was a loss where the defendant emailed the plaintiff's confidential information to himself before resigning from his position with the plaintiff).

The Court finds that Plaintiff has demonstrated a likelihood that it will prevail on its CFAA claim.

B. Trademark Infringement

Plaintiff also contends that it is likely to succeed on its trademark infringement claim, arguing that Defendant has used more of Plaintiff's trade name than necessary to criticize legitimately Plaintiff and its products and services. Defendant counters that, even if it has exceeded the nominative fair use to which it is entitled, it has only used Plaintiff's trademarks on internal

1 documents. Defendant further argues that, even if one of its
2 employees distributed the presentation, Defendant would not be
3 liable because any such action would be outside the scope of the
4 individual's employment.

5 Defendant states, "At this stage, it cannot be disputed that
6 the Presentation was intended for internal use at Softscape.
7 Softscape did not distribute the Presentation to the public, and
8 the disclosure of the Presentation was not authorized, ratified or
9 condoned by Softscape."² Response at 11. However, as Plaintiff
10 points out, whether or not Defendant authorized or condoned the
11 distribution of the Presentation, it was distributed. Moreover,
12 there is no evidence that anybody other than Defendant and its
13 employees had access to the presentation. Therefore, based on the
14 evidence currently available, and even accepting as true
15 Defendant's position that it did not intend the presentation to be
16 disseminated outside of the company, either Defendant or one of its
17 employees must have distributed the presentation or provided the
18 presentation to the individual who did so.

19 Defendant cites the Restatement of Agency § 7.03 in support of
20 its position that even if the document were distributed by one of
21 its employees, such distribution was unauthorized and therefore
22 outside the scope of that individual's employment. However, as
23 Plaintiff argues, the Restatement specifically states, "Conduct is
24 not outside the scope of employment merely because an employee

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26 ²It is notable that the only evidence Defendant provides in
27 support of this contention is the declaration of its general
28 counsel and emails regarding the confidentiality of the
presentation sent by Defendant's CEO after this lawsuit was filed.

disregards the employer's instructions." Rest. (3d) Agency § 7.07
cmt. c.

Even if Defendant did not intend to distribute the
presentation containing Plaintiff's registered marks, the
presentation was distributed and it is likely that Defendant can be
held liable for any causes of action based on that distribution.
Based on the evidence currently available, the Court finds that
Plaintiff has established a likelihood of succeeding on the merits
of its trademark infringement claim.

C. Lanham Act False Advertising Claim

Plaintiff next argues that it has established a likelihood of
success on the merits of its Lanham Act false advertising claim.
The Ninth Circuit has held that the elements of such a claim are:

(1) a false statement of fact by the defendant in a
commercial advertisement about its own or another's
product; (2) the statement actually deceived or has the
tendency to deceive a substantial segment of its
audience; (3) the deception is material, in that it is
likely to influence the purchasing decision; (4) the
defendant caused its false statement to enter interstate
commerce; and (5) the plaintiff has been or is likely to
be injured as a result of the false statement, either by
direct diversion of sales from itself to defendant or by
a lessening of the goodwill associated with its
products.

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th
Cir. 1997).

Plaintiff argues that much of the information contained in the
presentation is false or misleading, and provides declarations to
support its arguments. The statements in the declarations
submitted by Defendant are not sufficient to rebut Plaintiff's
evidence.

1 In fact, Defendant does not argue directly that the statements
2 are not false or misleading. Rather, Defendant argues that
3 Plaintiff's false advertising claim fails because (1) Defendant did
4 not use the presentation in commerce; (2) the presentation was not
5 an advertisement; and (3) Defendant did not circulate the
6 presentation in interstate commerce.

7 As Plaintiff notes, Defendant's argument that it did not use
8 the presentation in commerce fails because Defendant admittedly
9 continues to use information from the presentation in commerce. As
10 described above, Defendant's CEO sent an email to Defendant's sales
11 group instructing them to continue to use the information in the
12 presentation "in competitive situations." Watkins Decl., Ex. A.
13 Moreover, a press release posted on Defendant's website affirms the
14 veracity of the information in the presentation. Defendant has
15 emailed to its prospective customers a link to this press release.
16 These acts are sufficient to establish that Defendant is continuing
17 to represent the veracity of the contents of the presentation in
18 commerce.

19 Defendant next argues that the presentation was not an
20 advertisement. The Ninth Circuit has held that representations may
21 be considered advertisements if they are

22 1) commercial speech; 2) by a defendant who is in
23 commercial competition with plaintiff; 3) for the
24 purpose of influencing consumers to buy defendant's
25 goods or services. While the representations need
26 not be made in a "classic advertising campaign," but
27 may consist instead of more informal types of
28 "promotion," the representations 4) must be
disseminated sufficiently to the relevant purchasing
public to constitute "advertising" or "promotion"
within that industry.

1 Rice v. Fox Broad. Co., 330 F.3d 1170, 1181 (9th Cir. 2003)
2 (quoting Coastal Abstract Serv. v. First Am. Title Ins. Co., 173
3 F.3d 725, 735 (9th Cir. 1999)). Defendant asserts that Plaintiff's
4 claim fails because the "speech," which it defines as "the
5 circulation of the Presentation" was not conducted by Defendant.
6 However, as discussed above, the evidence before the Court strongly
7 suggests that Defendant can be held liable for any dissemination of
8 the presentation. Moreover, Defendant's continuing affirmation of
9 the veracity of the contents of the presentation constitutes
10 ongoing speech.

11 Defendant's final argument, that it did not cause the
12 presentation to enter interstate commerce, also relies on its
13 assertion that it cannot be held liable for the dissemination of
14 the presentation. Thus, this argument also fails. The Court finds
15 that Plaintiff has demonstrated a fair likelihood of success on the
16 merits of its Lanham Act false advertising claim. Because
17 Defendant has not provided evidence that the statements in the
18 presentation are true, the Court will enjoin Defendant from
19 affirming the veracity of such statements to the extent that they
20 purport to represent objective facts that can easily be proven true
21 or false.

22 II. Likelihood of Irreparable Injury

23 Plaintiff argues that it has demonstrated a likelihood of
24 irreparable injury because it will "continue to suffer immeasurable
25 loss to its relationships with actual and prospective customers
26 caused by the distribution of the Presentation if an injunction
27 does not issue." Application for TRO at 8.

1 Defendant counters that Plaintiff has already suffered any
2 harm stemming from the one-time distribution of the presentation.
3 Defendant further argues that past conduct cannot alone suffice to
4 establish the threat of irreparable injury. Finally, Defendant
5 contends that its stated intent not to distribute the presentation
6 in the future precludes the need for a preliminary injunction.
7 However, as discussed above, Defendant has continued publicly to
8 attest to the veracity of the material contained in the
9 presentation. Moreover, there is no evidence that Defendant has
10 publicly acknowledged that it, not Plaintiff's dissatisfied
11 customers, created the presentation.

12 Based on the likelihood of success on Plaintiff's trademark
13 infringement and false advertising claims discussed above, the
14 Court grants in part Plaintiff's motion for a preliminary
15 injunction.

16 III. Expedited Discovery

17 Plaintiff seeks expedited discovery with respect to two
18 issues: how Defendant accessed the restricted portions of its
19 computer system and which individuals were responsible for the
20 creation and distribution of the presentation. As discussed at the
21 hearing, by March 28, 2008, the parties were to have met and
22 conferred along with their respective IT experts to determine a
23 plan for preserving electronic evidence. Formal discovery may
24 commence forthwith. In addition, the parties shall conduct their
25 Federal Rule of Civil Procedure 26(f) conference on April 10, 2008
26 to establish a mutually agreeable discovery plan. To the extent
27 the parties are unable to agree, each party shall file a brief of
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1 five pages or less stating its position on the disagreement by
2 April 14, 2008.

3 CONCLUSION

4 The Court GRANTS in part Plaintiff's motion for a preliminary
5 injunction. The injunction has entered as a separate order.
6 Plaintiff's motion for expedited discovery is GRANTED in part.

7 IT IS SO ORDERED.

8
9 Dated: 4/1/08



CLAUDIA WILKEN
United States District Judge